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TO BE PLACED ON THE PUBLIC RECORD

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 705
COMPETITION IN THE RAILROAD INDUSTRY

REPLY COMMENTS SUBMITTED BY OLIN CORPORATION

Olin Corporation, through its Chlor Alkali Products Division ("Olin"), submits the following reply comments in STB Docket No. EP 705. Olin files this reply for two principal reasons: (I) to reply and respond to some of the assertions and statements made in this proceeding by other parties; and (II) to provide updates to its Exhibit A, filed with its comments in STB EP 705, which provides first-hand insight into the challenges faced by captive shippers and the lack of competition in the rail industry today.

I. Reply to assertions and statements made in this proceeding.

The current STB policies and regulations do not provide adequate incentives for competition and thereby enable the four major Class I railroads to effectively act as their own "regulators," a result not unlike the fox guarding the hen house. Under the current framework, railroads continue to extract increasingly higher rates from captive shippers while imposing onerous terms upon them. Consequently, it is not surprising that the railroads strongly oppose any change to the status quo. Although one of the goals of the Staggers Act—increasing the health of the U.S. rail system—has flourished under current STB policies and regulations, the equally important goal of increasing competition has not.

As noted by many interested parties, including Olin, the statutory provisions that theoretically allow captive shippers to seek relief have been abrogated by the practically impossible standards for obtaining relief under those statutes. Consequently, shippers are deterred from pursuing statutory relief and railroads exploit this situation by imposing increasingly onerous terms and rates on shippers. Contrary to the railroads' assertions that the STB has no authority to change its policies, a change in policy is justified by the consolidation and changes in the rail industry. A change in policy that reflects the change in the rail industry is not only justified, it is necessary to achieve the intent and goals of the legislation that Congress has enacted.

1. The STB has the right, and the duty, to issue new policies and regulations that address the lack of competition in the rail industry today.

As noted by several interested parties, Olin and other captive shippers are not seeking to increase regulation of the rail industry; rather, they are seeking deregulation of barriers to competition and meaningful application of existing statutes to obtain relief from the abusive practices of the railroads.[1] Changes to policy and regulations are necessary in light of the changed circumstances in the rail industry. In short, Olin seeks a competitive rail system that meets the needs of the variety of shippers that are commercially dependent on reasonable rail transportation.

In the comments filed by the railroads and their trade groups, a recurring theme is the assertion that the STB has no authority to modify the regulations and policies that are currently in place. To support this assertion, the railroads claim that the STB cannot make changes to

[1] Alliance For Rail Competition, et al. Comments 4 (Filed April 12, 2011).

existing regulations because Congress has already ratified the existing regulations.[2] Despite this assertion, case law firmly establishes that the STB has the discretion to change or modify its regulations and policies, including its application of statutory competitive access provisions and its approach to determining the reasonableness of rail rates.

An agency has the same broad discretion in changing its policies as it does in initially issuing them—i.e., an agency's policy or application of a statute will be upheld "if the regulation is based on a permissible construction of the statute."[3] Thus, an agency must only provide a reasoned explanation for a change in policy or regulation.[4] In FCC v. Fox, the Supreme Court addressed the issues of whether agency action is subject to a heightened standard of review simply because it represents a change in administrative policy and whether agency action representing a change in policy need be justified by better reasons than those required to adopt a policy in the first instance.[5] In answering both issues, the Court stated that an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates."[6]

The fact that the STB is free to change its regulations and policies is supported by the initial joint comments of the DOJ and DOT. Without advocating for or against any specific changes, these agencies stated that it "is appropriate to investigate the extent to which relevant circumstances (such as rail capacity constraints, industry consolidation, and increasing revenue

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[2] See e.g. NS Comments 25 (Filed April 12, 1011); CSX Comments 28 (Filed April 13, 1011); AAR Comments 31 (Filed April 12, 1011).
[3] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).
[4] FCC v. Fox Television Stations, Inc., 556 U.S ---, 129 S.Ct. 1800, 1811 (2009).
[5] Id.
[6] Id. (emphasis in original).

adequacy) have changed and whether a proper balance of these or other considerations warrant different policy changes."[7] Thus, the DOJ and DOT recognize that the STB has the authority to change its policies and regulations to meet changes in circumstances. As noted by the DOJ and DOT, changes in regulations do not necessarily constitute a step away from the underlying statutory principles, but may be necessary to ensure that existing principles are "properly applied under present circumstances."[8]

The railroads' attempt to support their assertion that the STB does not have authority to change regulations is founded upon misapplication of cases that are not on point. For example, the NS cites FDA v. Brown[9] for the proposition that "[w]hile an agency has the ability to change its own interpretation of a statute so long as Congress has not spoken on the question, it loses that ability if Congress acts to adopt that same interpretation."[10] The NS's reliance on FDA v. Brown is wholly misplaced, however, because that case involved the question of agency jurisdiction and did not involve the question of when an agency with jurisdiction can change its existing regulations.

In FDA v. Brown, the FDA sought to regulate tobacco, a product the FDA had never regulated before and that was subject to extensive regulation by several statutes. In noting that Congress had enacted a number of statutes creating a regulatory scheme for tobacco, including some that rejected giving the FDA regulatory authority, the Supreme Court held that the FDA did not have jurisdiction to regulate tobacco.[11] The question presented in FDA v. Brown, whether an agency even had jurisdiction to issue regulations, is easily distinguishable from one

[7] DOT and DOJ Comments 4 (Filed April 12, 1011).
[8] Id.
[9] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[10] NS Comments 16 (Filed April 12, 1011).
[11] FDA v. Brown, 529 U.S. at 161.

of the questions raised in this proceeding, which is when an agency with jurisdiction can modify the regulations it has previously issued. The logical answer to this question, as held in FCC v. Fox, is that an agency can change its regulations when there is a change of circumstances that reasonably warrants such change.

The NS's reliance on Bob Jones v. U.S. [12] is also misplaced. The NS cites Bob Jones v. U.S. initially for the proposition that a history of Congressional acquiescence to an agency's interpretation of a statute can be a ratification of that interpretation.[13] Although this initial proposition is supported to some extent by Bob Jones v. U.S., the NS then misapplies Bob Jones v. U.S. by incorrectly drawing the conclusion that an agency cannot change its policies or regulations once Congress has "ratified" the agency's interpretation by repeatedly not acting to change the agency's regulation.[14]

In Bob Jones v. U.S., Bob Jones University challenged the IRS's interpretation of a provision of the tax code that resulted in a denial of tax-exempt status to the university. In contrast to the issues raised in this STB proceeding, Bob Jones University was not challenging the IRS's authority to change its regulations; rather, it was arguing that the IRS incorrectly interpreted the statute at issue.[15] In other words, the issue revolved around whether the agency took the correct action, not whether the agency had the authority to take the action. In this context, where Bob Jones argued that the IRS misinterpreted Congress's intent, the Supreme Court held that subsequent inaction by Congress to change the agency's new policy could be interpreted as evidence that the IRS had interpreted the statute correctly.[16] Thus, the NS

[12] Bob Jones University v. U.S., 461 U.S. 574 (1983).
[13] See NS Comments 25 (Filed April 12, 1011).
[14] Id. 25-28.
[15] Bob Jones v. U.S., 461 U.S. at 577.
[16] Id. at 600-602.

misapplies the holding of Bob Jones v. U.S. by asserting that the STB cannot change its existing competitive access provisions.

Not only does the NS misapply the holding of Bob Jones v. U.S., but the NS also glosses over the end result of that case, which was that the Supreme Court upheld the IRS's new policy. Although the authority of the IRS to change its policy was not at issue before the Supreme Court, the Court clearly recognized the IRS's authority by approving of the change in policy. In upholding the IRS's change in policy, the Supreme Court recognized that an agency has the right to change its regulations. The Court stated that although Congress can modify IRS rulings it considers improper,

> [i]n the first instance, however, the responsibility for construing the Code falls to the IRS. Since Congress cannot be expected to anticipate every conceivable problem that can arise or to carry out day-to-day oversight, it relies on the administrators and on the courts to implement legislative will. Administrators, like judges, are under oath to do so.[17]

Thus, not only does the STB have the right to change its regulations, but it also has the duty to do so when circumstances arise that warrant a change. A year after Bob Jones v. U.S., the Supreme Court again recognized that agencies "must consider varying interpretations and the wisdom of its policy on a continuing basis."[18] From these cases and from FCC v. Fox, it is clear the STB can, and must, continually evaluate its policies and change them as necessary to adapt to changed circumstances.

2. The dramatic changes in the rail industry as documented by the comments filed in this proceeding justify a change in the STB's policies and regulations.

As noted throughout the comments filed in this proceeding, there have been numerous changes in the rail industry since the passage of the Staggers Act that warrant changes in policy

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[17] Id. at 596-597.
[18] Chevron, 467 U.S. at 838.

to ensure the principles adopted after the passage of the Staggers Act are adhered to. These principles, which should guide the STB in this proceeding, are succinctly summarized in the DOJ and DOT joint comments as follows:

> 1 – Shippers should not be required to pay more than necessary for carriers to earn adequate revenues;
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> 2 – Shippers should not pay more than is necessary for efficient service;
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> 3 – Shippers should not pay for facilities or services that do not benefit them;
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> 4 – Responsibility for payment of facilities should be based on demand elasticities of each shipper.[19]

It is clear from many of the comments filed in this proceeding that the current state of the rail industry is impeding advancement of these principles. Railroads frequently charge rates that far exceed what is necessary to earn sufficient revenues. For example, CF Industries, Inc. reports rate quotes with R/VC ratios exceeding 1,000%.[20] M&G Polymers USA, LLC notes that rates have dramatically risen to an unsustainable level, thereby curtailing the economic growth of West Virginia.[21] Furthermore, as noted by several commentators, the consolidation of the rail industry has led to a marked decrease in competition.[22] Olin's own experience is also well documented in Exhibit A to its comments and is further elaborated on at the end of this Reply Brief.

In addition to comments on abuses by the railroads, there have also been extensive comments on the strong financial state of the railroads.[23] The profitability of the railroads

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[19] DOT and DOJ Comments 4 (Filed April 12, 1011).
[20] CF Comments 4 (Filed April 13, 2011).
[21] M&G Comments 2-3 (Filed April 12, 2011).
[22] See e.g. E.I. du Pont Comments 3-5, 8-11 (Filed April 12, 2011); Captive Coal Shipper Comments 70 (Filed April 12, 2011); Alliance For Rail Competition, et al. Comments 6-9 (Filed April 12, 2011).
[23] See e.g. Alliance For Rail Competition, et al. Comments 16-20 (Filed April 12, 2011).

continues to be widely reported on. For example, Bloomberg news recently reported that BNSF paid $2.25 billion in dividends to Berkshire Hathaway within 13 months of Berkshire Hathaway's acquisition of BNSF, and BNSF expects to pay another $1 billion dividend this month.[24] These news reports confirm the comments made in this proceeding that the financial state of the rail industry is strong.

From these comments on the financial state of the rail industry and the lack of competition and abusive rates faced by captive shippers, it is nearly indisputable that the state of the rail industry is dramatically different from what it was when the STB formed the policies and regulations that are currently in place. Because the changed circumstances have resulted in a system in which the principles and goals of the Staggers Act are not being achieved, the STB should make changes to better achieve those principles and goals.

3. Evaluating proposed changes to policy and regulations in response to the dramatic changes in the rail industry.

Many proposals have been provided in the comments in this proceeding to address the current state of the rail industry. The STB should explore and evaluate these and other proposals to determine the best way to respond to the changes in the rail industry and the challenges facing shippers and railroads. In deciding on the policies and regulations that it should issue, the STB should keep in mind that shippers are not seeking increased regulation of the rail industry; rather, shippers are simply seeking increased competition and meaningful avenues of relief when railroads abuse their market dominance by imposing onerous terms and rates on shippers.

Also, it should be noted that shippers' support for competitive access provisions is not driven by any intention to burden railroads or decrease their efficiency; rather, it is a response to

[24] *Buffett Takes $2.25 Billion in Burlington Dividends Since Biggest Takeover*, Bloomberg News, May 9, 2011, http://www.bloomberg.com/news/2011-03-09/berkshire-takes-2-25-billion-in-dividends-from-burlington.html.

the onerous rates and terms that railroads force upon them. If railroads simply charged reasonable rates, shippers would have no need to advocate for meaningful application of statutory competitive access provisions.

As noted in Olin's comments, perhaps one of the simplest and least onerous methods of advancing the principles of the Staggers Act would be to impose an R/VC ceiling on the rates that carriers charge captive shippers.[25] The current jurisdictional floor of 180% R/VC that is required to challenge a rate demonstrates the intent of Congress to provide limits on what railroads can charge captive shippers. Applying an R/VC ratio as a ceiling on rates would be consistent with Congress's use of it as a jurisdictional floor.

Additionally, an R/VC ceiling would be a potent mechanism for stopping the abuse of captive shippers by the railroads. This type of regulation would surely be more palatable to railroads than other alternatives, as potential logistical and operational concerns would be avoided. Furthermore, unlike a rate challenge, which is purely remedial in nature in that it can only be brought after a shipper has been forced to pay an excessive rate, an R/VC ceiling would be a preventative solution that would avoid abuse in the first instance. Olin again respectfully requests that the STB consider this approach and seek comment from the public on it.

II. Updates to Exhibit A to Olin's comments providing a captive shipper's experience in today's rail industry.

As noted in Exhibit A to Olin's comments in STB EP 705, Olin operates a chlor alkali plant in McIntosh, Alabama (the "SunBelt facility") under a contract with the plant's owner, SunBelt Chlor Alkali Partnership ("Sunbelt"). SunBelt is captive to the NS and is contractually obligated to deliver up to 250,000 tons of chlorine (approximately 2,777 rail tank cars) per year

[25] Olin Comments 22-23 (Filed April 12, 2011).

to its only chlorine customer, which is located at LaPorte, Texas[26] (the "SunBelt movement"). Exhibit A details the NS's systematic denial of any competitive option for SunBelt.

From 1997 until March 30, 2011, the SunBelt movement was made under private contract between UP, the NS and SunBelt whereby the chlorine was shipped from SunBelt's McIntosh facility via the NS to New Orleans and then via UP from New Orleans to LaPorte. The expired contract did not require SunBelt to indemnify the NS or UP for liabilities that SunBelt has no role in causing.

Leading up to March 30, 2011, the NS attempted to impose onerous terms on SunBelt (on top of unreasonable rates), including an unreasonable indemnity term that could have essentially forced SunBelt to become an insurer of the NS against third party claims. To avoid these onerous terms, SunBelt was forced to begin shipping the SunBelt movement at an even higher rate under public tariff NSRQ 70319 on March 31, 2011. NSRQ 70319 did not contain unreasonable indemnity terms.

On April 11, 2011, the same day Olin filed its comments in STB EP 705 and only twelve (12) days after SunBelt began shipping under NSRQ 70319, the NS notified SunBelt that it amended NSRQ 70319 to expire May 1, 2011—the minimum twenty (20) day notice required by the STB's regulations. The NS also notified SunBelt that UP Tariff UPTF 4955 would be effective May 2, 2011. The NS's notification of the switch from NSRQ 70319 to UPTF 4955 was highly unusual because the NS, not UP, is the originating carrier. UPTF 4955 incorporates Items 50 and 60 of UP 6607. Item 60-D contains an unreasonable indemnity term similar to the one that the NS attempted to impose on SunBelt, which could essentially force SunBelt to become an insurer of the carrier.

[26] The Texas customer has a contractual right to request delivery to alternative destinations.

On April 26, 2011, SunBelt sent a letter to UP objecting to the indemnity terms contained in UPTF 4955 and requesting that UP publish a revised tariff. The very next day, on April 27, 2011, before responding to SunBelt and without advance notification, UP filed a petition with the STB seeking to open a declaratory order proceeding.[27] UP has sought a declaratory order on the reasonableness of its indemnity provision despite the STB's recent decision that it would not issue broad policy statements on such provisions.[28]

Since the NS notified SunBelt of the change in tariff, the NS has extended its tariff until June 15, 2011. The NS has notified SunBelt that UPTF 4955 is to take effect on June 16, 2011 and that it will contain the unreasonable indemnity terms that SunBelt has objected to. The ability of railroads to impose onerous terms and rates on captive shippers is demonstrated by SunBelt's inability to obtain a reasonable rate or competitive option for the SunBelt movement. Unreasonably high rail rates not only hurt shippers, but they also hurt consumers who ultimately pay more for the goods they buy. For these reasons, SunBelt strongly supports meaningful changes to rail policy to ensure that a viable and competitive rail system exists to meet the needs of the variety of industries that depend on reasonably priced rail transportation.

[27] FD 35504, UP Petition (filed April 27, 2011).
[28] EP 698, Decision (STB served April 15, 2011).

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